

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SBC Petition for Declaratory Ruling That)	WC Docket No. 05-276
UniPoint Enhanced Services, Inc. d/b/a)	
PointOne and Other Wholesale Transmission)	
Providers Are Liable for Access Charges)	
AT&T's Phone-to-Phone IP Telephony)	
Services are Exempt from Access Charges)	
Petition for Declaratory Ruling That VarTec)	
Telecom Inc. Is Not Required to Pay Access)	
Charges to Southwestern Bell Telephone)	
Company or Other Terminating Local)	
Exchange Carriers When Enhanced Service)	
Providers or Other Carriers Deliver the Calls to)	
Southwestern Bell Telephone Company or)	
Other Local Exchange Carriers for Termination)	

**COMMENTS
of the
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES;
UNITED STATES TELECOM ASSOCIATION; and the
WESTERN TELECOMMUNICATIONS ALLIANCE**

The Independent Telephone and Telecommunications Alliance (ITTA);¹ the
National Exchange Carrier Association, Inc. (NECA),² the National Telecommunications

¹ ITTA is an organization of midsize incumbent local exchange carriers ("ILECs") that collectively serve over ten million access lines in over 40 states and offer a diversified range of services to their customers. Most ITTA member companies qualify as rural telephone companies within the meaning of Section 3(37) of the Communications Act of 1934, as amended (the "Act"). 47 U.S.C. § 153(37).

² NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission's Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 incumbent local exchange carriers (ILECs) that choose to participate in these arrangements.

Cooperative Association (NTCA),³ the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),⁴ the United States Telecom Association (USTelecom);⁵ and the Western Telecommunications Alliance (WTA)⁶ (jointly, the “Associations”) hereby submit these comments in response to the Commission’s Public Notice⁷ seeking comment on Petitions for Declaratory Ruling filed by the ILECs affiliated with SBC Communications, Inc. (SBC) and by VarTec Telecom, Inc. (VarTec).

The Associations urge the Commission to act quickly and decisively in this matter by promptly granting SBC’s petition⁸ and confirming its previous ruling that interstate phone-to-phone calls that utilize Internet Protocol (IP) transmission technology (“IP-in-the-middle”) are subject both to originating and terminating interstate access charges regardless of whether such calls are routed via intermediate carriers prior to termination

³ NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Act.

⁴ OPASTCO is a national trade association representing over 560 small ILECs serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 2.5 million customers. All OPASTCO members are rural telephone companies as defined in the Act.

⁵ USTelecom represents over 1200 communications service providers and suppliers for the telecom industry. USTelecom’s carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

⁶ WTA is a trade association that was formed by the merger of the Western Rural Telephone Association and the Rocky Mountain Telecommunications Association. It represents approximately 250 rural telephone companies operating west of the Mississippi River.

⁷ Pleading Cycle Established for SBC’s and VarTec’s Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls, WC Docket No. 05-276, *Public Notice*, DA 05-2514 (rel. Sept. 26, 2005).

⁸ Petition of the SBC ILECs for a Declaratory Ruling, WC Docket No. 05-276 (Sept. 21, 2005) (*SBC Petition*).

by local exchange carriers (LECs). The Commission should likewise deny VarTec's petition⁹ insofar as it seeks to exempt facilities-based carriers from access charges for ordinary long distance traffic, or to impose obligations on terminating LECs to pay transiting charges to wholesale transmission providers carrying long distance traffic.

I. THE COMMISSION SHOULD GRANT SBC'S PETITION AND PROMPTLY REAFFIRM THAT THE USE OF IP TECHNOLOGY TO TRANSPORT VOICE CALLS DOES NOT EXEMPT SUCH CALLS FROM ACCESS CHARGES

The SBC ILECs seek a declaratory ruling to the effect that wholesale transmission providers using IP technology to transport ordinary long-distance calls are liable for access charges under section 69.5 of the Commission Access Charge rules and the SBC ILECs' access tariffs.¹⁰

The Commission has already declared the use of IP technology to transport long-distance voice calls ("IP-in-the-middle") does not exempt those calls from access charges.¹¹ SBC alleges, however, that certain companies using IP-in-the-middle are refusing to compensate SBC and other LECs for the use of their networks in spite of the Commission's Order.¹²

⁹ VarTec's Petition for Declaratory Ruling, WC Docket No. 05-276 (Aug. 20, 2004) (*VarTec Petition*).

¹⁰ The SBC ILECs filed their petition after the U.S. District Court for the Eastern District of Missouri dismissed without prejudice claims seeking payment of access charges for long-distance calls that were transported using IP technology. The court referred to the FCC the question of whether PointOne and Transcom (entities that offer wholesale IP-based transmission services to retail interexchange carriers) are themselves considered "interexchange carriers" under the Commission's access charge rules and therefore liable for access charges under interstate access tariffs. On September 29th, the Court amended its prior order by issuing a stay, rather than a dismissal without prejudice, of the action. See Letter from Eric N. Einhorn, SBC, to Marlene H. Dortch, FCC, WC Docket No. 05-276 (attaching the District Court Order staying the matter).

¹¹ *SBC Petition* at 10-14.

¹² *Id.* at 14-16.

SBC has sought enforcement of the Commission's Order in the United States District Court for the Eastern District of Missouri. However, the district court referred the matter to the Commission, after being convinced that there were technical matters involved in the case beyond its expertise, and that the case raised policy issues currently under Commission review.¹³

The Associations find it incomprehensible that, more than one year after the Commission made clear in the *AT&T Order*¹⁴ that interexchange calls using IP-in-the-middle are subject to access charges, SBC was forced to go to court, then back to the Commission, then back to court again, to collect access charges on such calls. The Commission should not tolerate continued attempts to circumvent compensation of LECs for the use of their networks in this manner.

The carriers described in SBC's petition are clearly liable for access charges under the circumstances described therein. It makes no difference that long-distance traffic may in some cases be routed through an intermediary carrier prior to hand-off to the ILEC for termination.¹⁵ The Commission should firmly and unequivocally instruct the court to this effect by issuing the declaratory ruling requested by SBC as soon as possible.

SBC demonstrates that these carriers' failure to pay interstate access charges have

¹³ *Id.* at 17.

¹⁴ Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, *Memorandum Opinion & Order*, 19 FCC Rcd 7457 (2004) (*AT&T Order*).

¹⁵ *Id.* at n. 92 ("To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.")

imposed substantial financial burdens on its operations.¹⁶ The Associations are equally concerned about the harms caused by such access avoidance schemes to other ILECs, especially those operating in rural areas. Rural LECs receive a significant portion of their operating revenue from access charges, and are highly dependent on these revenues to provide affordable and high-quality service for customers, and to maintain and advance their networks.¹⁷ Attempts by IXC's to skirt the Commission's rules or create the appearance of access charge "loopholes" will, if left unchecked, undermine a vital source of rural ILECs' cost recovery. If the access charge regime becomes unstable as a result, high-cost Universal Service support funds will be required to make up the difference, further complicating the Commission's efforts to reform universal service programs. If the USF for any reason is not able to make up these shortfalls, rural consumers would either face higher local rates, inferior service, or some combination of these outcomes, all of which would violate section 254 of the Telecommunications Act of 1996.

The Associations recognize that technological and marketplace changes periodically require alterations to the regulatory framework under which the Commission achieves its universal service goals. The Associations are working with the Commission in a variety of proceedings to respond to and anticipate such changes, many of which stand to offer benefits to consumers. However, companies should not be permitted to claim regulatory uncertainty where no uncertainty exists. The Commission can and

¹⁶ *SBC Petition* at 34 (estimating that the providers at issue have already deprived the SBC ILECs of more than \$100 million in switched access charges, and continue to circumvent more than \$1 million per month in switched access charges from the SBC ILECs alone.)

¹⁷ See *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Comments* of the National Exchange Carrier Association, Inc. (May 23, 2005) at 4.

should solve this problem now by issuing a clear and strong ruling declaring that the carriers described in SBC's petition are liable for access charges under section 69.5 of the Commission's rules and ILEC access tariffs.

II. THE COMMISSION SHOULD DENY VARTEC'S PETITION INsofar AS IT SEEKS TO EXEMPT FACILITIES-BASED CARRIERS FROM ACCESS CHARGES OR IMPOSE "TRANSITING" COSTS ON ILECs FOR ORDINARY LONG DISTANCE TRAFFIC.

VarTec seeks a declaratory ruling to the effect that it is not required to pay access charges to the SBC ILECs or other terminating LECs when the carriers with whom VarTec has business relationships deliver calls to SBC and other LECs for termination.¹⁸

VarTec argues at length in this regard that it does not connect directly with the SBC ILECs or other LECs, and is therefore not a "customer" for purposes of LEC access tariffs.¹⁹

VarTec never explains exactly what services it does offer or how it connects to SBC's network. From an examination of VarTec's web site, it appears that VarTec is a retail telecommunications carrier offering traditional local, long distance and wireless telecommunications services to customers on a common carrier basis.²⁰ Thus, VarTec may well be functioning as an IXC and therefore be subject to access charges under section 69.5 of the Commission's rules.

Although VarTec claims it is not SBC's customer for the wireline traffic at issue, it may be seeking to avoid paying access charges by routing traffic through one or more

¹⁸ *VarTec Petition*.

¹⁹ *Id.* at 3.

²⁰ See www.VarTec.com.

competitive local exchange carrier (CLEC) and other providers, who then terminate VarTec's calls on the Public Switched Telephone Network (PSTN) as if they were "local." To the extent VarTec and similarly-situated carriers seek to gain access to local carriers' networks to terminate interexchange traffic, they are liable for access charges. Such carriers may not circumvent the access charge rules by inter-positioning IP-based carriers between themselves and a terminating ILEC, but should instead be considered as having constructively ordered access services.²¹

Inasmuch as VarTec fails to explain, however, exactly what services it does provide, the nature of the traffic at issue, or the relationships between itself and its intermediate carriers, it has not provided the Commission with sufficient information. Accordingly, the Commission should not issue the requested declaratory ruling but should instead deny VarTec's petition insofar as it asks for a blanket exemption from access charges. For the same reason, the Commission should also deny VarTec's petition for a declaration that attempts by SBC or other terminating local exchange carriers violate section 201(b) and 203(c) of the Act.²²

VarTec also claims that it should be compensated by SBC for transiting CMRS-

²¹ *SBC Petition* at 32-33 (citing Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, *Declaratory Ruling*, 17 FCC Rcd 13192 (2002) at ¶8.) Even in the absence of a direct carrier-customer relationship under tariff, VarTec might still be liable for use of SBC's network on a *quantum meruit* basis. The Commission has long recognized implied-in-law contracts to compensate local carriers that are required to interconnect with, and terminate traffic for, long distance carriers. See, e.g., Exchange Network Facilities for Interstate Access (ENFIA), *Memorandum Opinion & Order*, 71 FCC 2d 440 (1979) at ¶48 (indicating that LECs not affiliated with the Bell System or GTE had a legal obligation to interconnect with Other Common Carriers (OCCs) and could negotiate agreements for compensation and, in the absence of such an agreement, could collect reasonable compensation under the theory of *quantum meruit*). See also, Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as Amended, *Order on Reconsideration*, 12 FCC Rcd 15014 (1997) at ¶34 (stating that, even without an applicable tariff or customer contract, carriers providing services were entitled, at a bare minimum, to recover charges on a *quantum meruit* basis).

originated traffic to SBC based on the FCC's decision in the *Texcom* case.²³ VarTec has misstated and confused the Commission's holding in *Texcom*. That proceeding involved a complaint by a one-way paging carrier that Verizon North (f/k/a GTE North) improperly billed Texcom (d/b/a Answer Indiana) for traffic transiting GTE North's network.²⁴ Specifically, GTE North delivered calls from the public switched network to Answer Indiana's point of termination, and billed the paging carrier for "numbers, call termination, and facilities used to deliver calls to Answer Indiana's network."²⁵

In deciding the complaint, the Commission repeated its prior holding in the *TSR Wireless* case²⁶ that an interconnecting LEC is not permitted to charge a paging carrier for traffic originated by the LEC's end user customers.²⁷ The Commission did allow GTE North to charge the paging carrier for transporting traffic that originated on a third party's network.²⁸ In this regard, however, *Texcom* addressed a narrow situation where the transiting traffic at issue mostly originated with callers on a wireline carriers' network, with a portion originating on third party networks delivered via local interconnection trunks to a one-way paging carrier.

²² *VarTec Petition* at 6-8.

²³ *Id.* at 11-12 (citing *Texcom Inc. v. Bell Atlantic Corp., Inc.*, File No. EB-00-MD-14, *Memorandum Opinion & Order*, 16 FCC Rcd 21493 (2001) ("*Texcom*"), *recon. denied*, 17 FCC Rcd 6275 (2002) ("*Texcom Recon.*")).

²⁴ *Texcom* at ¶1.

²⁵ *Id.* at ¶3.

²⁶ *TSR Wireless, LLC v. U S West Communications, Inc.*, *Memorandum Opinion & Order*, 15 FCC Rcd 11166 (2000) (*TRS Wireless*), *recon. dismissed*, 16 FCC Rcd 11462, *aff'd sub. nom.*, *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

²⁷ *Texcom* at ¶4 (citing *TRS Wireless* at ¶ 18).

VarTec would apparently have the Commission apply its narrow ruling in *Texcom* to virtually all CMRS-originated traffic from entire MTAs, a nonsensical result. With large and growing CMRS traffic volumes,²⁹ such a ruling would give VarTec and every other intermediate carrier huge uneconomic incentives to engage in unnecessary call transport for a share of transiting fee payments from terminating carriers. The Commission should not expand the *Texcom* holding in this manner but should instead deny this portion of VarTec's petition as well.

III. CONCLUSION

For the reasons explained above, the Commission should grant SBC's petition and expeditiously re-affirm that IP-in-the-middle long distance calls are subject to access charges, notwithstanding the fact that some carriers may choose to route these calls via intermediate carriers prior to termination. Similarly, the Commission should deny VarTec's petition insofar as it seeks to exempt facilities-based IXC's from access charges

²⁸ *Id.* at ¶4.

²⁹ A recent (Nov. 1, 2005) paper from the University of California – Davis indicates that wireless-to-wireline minutes of use are growing at an annual rate of 35%. “Systems Engineering to Evolve the PSTN for IP Service Delivery,” available online at networks.cs.ucdavis.edu/~workshop/Keynote.pdf (visited Nov. 2, 2005).

for ordinary long distance traffic, or to impose obligations on terminating LECs to pay transiting charges to wholesale transmission providers carrying long distance traffic.

Respectfully submitted,

INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE

By: /s/ David W. Zesiger
David W. Zesiger
Executive Director
1300 Connecticut Ave., NW Suite
600
Washington, DC 20036
(202) 355-1388

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.

By: /s/ Richard A. Askoff
Richard A. Askoff
Its Attorney
80 South Jefferson Road
Whippany, New Jersey 07981
(973) 884-8000

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell
Daniel Mitchell
Jill Canfield
Its Attorneys
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203
(703) 351-2000

ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations

Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

21 Dupont Circle NW
Suite 700
Washington, DC 20036
(202) 659-5990

UNITED STATES TELECOM ASSOCIATION

By: /s/ James W. Olson
James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

607 14th Street, N.W. Suite 400
Washington, DC 20005-2164
(202) 326-7300

WESTERN TELECOMMUNICATIONS
ALLIANCE

By: /s/ Gerry Duffy
Gerry Duffy
Counsel for WTA
317 Massachusetts Ave. N.E.,
Suite 300 C
Washington, DC 20002
(202) 548-0202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Association's Comments was served this 10th day of November 2005, by electronic filing, and electronic mail to the persons listed below.

By: /s/ Elizabeth R. Newson
Elizabeth R. Newson

The following parties were served:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
(via ECFS)

Jennifer McKee
Pricing Policy Division
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
Jennifer.McKee@fcc.gov

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, S.W.
Washington, DC 20554
fcc@bcpiweb.com